Loganathan a/l Tharumalingam v Khong Chia Soon

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT-22–495 OF 1999
NIK HASMAT JC
10 AUGUST 2010

Civil Procedure — Pleadings — Defence — Application for leave to amend to include defence of limitation — Application filed after commencement of trial — Leave granted, appeal against — Whether there was inordinate delay in filing application — Whether there were cogent reasons for delay — Whether proposed amendment raised totally new defence — Whether proposed amendment mala fide and prejudicial to plaintiff's case — Rules of the High Court 1980 O 20 r 5

On 4 May 1999, the plaintiff commenced an action against four defendants for the fraudulent charge of his land to obtain a banking loan facility. On 4 February 2005, the ninth defendant was included as a party to the plaintiff's action. In the amended statement of claim the plaintiff had specifically pleaded the ninth defendant's purported fraudulent involvement in securing the banking loan facility for the second defendant company, of which the ninth defendant was a director. On 8 October 2009, some 4 ½ years after the amended statement of claim was served on the ninth defendant and a week after the commencement of the trial, the ninth defendant applied for leave to amend his statement of defence to include the defence of limitation. In his application the ninth defendant submitted that he only came to know that he could avail himself of the defence of limitation during the plaintiff's testimony in court and that since he had not pleaded limitation in his statement of defence he sought the inherent jurisdiction of the court for leave to amend his defence to include this defence. He submitted that the proposed amendment to include the defence of limitation was necessary as it would determine whether the plaintiff's cause of action was time barred. He further submitted that the proposed amendment would not prejudice the plaintiff's case or cause any delay to the ongoing court proceeding. The senior assistant registrar ('the SAR') who heard the ninth defendant's application granted the latter leave to amend the statement of defence to include the defence of limitation. This was the plaintiff's appeal against that order. The plaintiff contended that it would not be in the interest of justice to allow the ninth defendant's proposed amendment as the application to amend was mala fide and prejudicial to the plaintiff's case.

Held, allowing the appeal with costs:

(1) Although under O 20 r 5 of the Rules of the High Court 1980, an

amendment to the writ and pleadings could be made at any stage of proceedings, as a general principle, the court would only allow such amendment that did not cause injustice. In the present case, the ninth defendant did not offer any cogent reasons for the delay in filing the application to amend except his sudden realisation after the plaintiff's testimony in court that the defence of limitation had not been pleaded in his statement of defence. The court therefore concluded that there had been an inordinate and substantial delay in the filing of the ninth defendant's application to amend, which would effectively disrupt the expeditious disposal of this case (see paras 6–7 & 9–10).

(2) The court found that the purpose of the proposed amendment was not only to amend but to raise a totally new defence of limitation for the first time. Further, the ninth defendant had full knowledge of the plaintiff's allegation of fraud against him, which was fully pleaded in the plaintiff's amended statement of claim. As such, it would not be in the interest of justice to present the ninth defendant an opportunity to rely on an entirely new defence at a relatively advanced stage of the court proceeding. In any circumstances, the ninth defendant's proposed defence of limitation, which was premised on the contentious dates relating to the plaintiff's actual discovery of the fraud, appeared to be without merit and amounted to a bare denial (see paras 11–12 & 14).

(3) The proposed amendment, which was intended to introduce an entirely new limitation defence, was mala fide, self serving and prejudicial to the plaintiff. The application if allowed would effectively render the plaintiff's cause of action totally unsustainable in court and cause grave and undue injustice. Thus the SAR's order ought to be set aside (see paras 16 & 19–20).

[Bahasa Malaysia summary

Pada 4 Mei 1999, plaintif memulakan tindakan terhadap empat orang defendan bagi fraud gadaian tanah untuk mendapatkan kemudahan pinjaman perbankan. Pada 4 Februari 2005, defendan kesembilan telah dimasukkan sebagai pihak kepada tindakan plaintif. Dalam satu penyataan tuntutan yang dipinda, plaintif telah secara khusus memplidkan dakwaan penglibatan fraud defendan kesembilan dalam mendapatkan kemudahan pinjaman perbankan untuk syarikat defendan kedua, di mana defendan kesembilan ialah seorang pengarah. Pada 8 Oktober 2009, kira-kira 4½ tahun selepas penyataan tuntutan disampaikan kepada defendan kesembilan dan seminggu selepas bermulanya perbicaraan tersebut, defendan kesembilan memohon untuk mendapatkan kebenaran untuk meminda penyataan pembelaan untuk menyertakan pembelaan had masa. Dalam permohonan tersebut, defendan kesembilan menghujahkan bahawa dia mendapat tahu bahawa dia boleh menggunakan pembelaan had masa hanya semasa keterangan plaintif di mahkamah dan bahawa memandangkan dia tidak memplidkan had masa

dalam penyataan pembelaannya, dia meminta bidang kuasa sedia ada mahkamah bagi membenarkannya meminda pembelaan untuk memasukkan pembelaan ini. Dia menghujahkan bahawa pindaan yang dicadangkan agar termasuk pembelaan had masa adalah perlu kerana ia akan menentukan sama ada kausa tindakan plaintif adalah terhalang had masa. Dia seterusnya menghujahkan bahawa pindaan yang dicadangkan tidak akan menjejaskan kes plaintif atau menyebabkan sebarang kelewatan dalam prosiding mahkamah yang sedang berjalan. Penolong kanan pendaftar ('PKP') yang mendengar permohonan defendan kesembilan membenarkannya meminda penyataan pembelaan termasuk pembelaan had masa. Ini adalah rayuan plaintif terhadap perintah tersebut. Plaintif menegaskan bahawa ia tidaklah menjadi satu kepentingan keadilan untuk membenarkan permohonan pindaan defendan kesembilan kerana permohonan untuk meminda adalah mala fide dan akan memudaratkan kes plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun di bawah A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980, pindaan kepada writ dan pliding boleh dibuat di mana-mana peringkat prosiding kerana sebagai satu prinsip umum, mahkamah hanya akan membenarkan apa-apa pindaan yang tidak menyebabkan ketidakadilan. Dalam hal ini, defendan kesembilan tidak memberikan sebarang alasan yang meyakinkan bagi kelewatannya memfailkan permohonan untuk meminda kecuali kesedarannya selepas keterangan plaintif di mahkamah bahawa pembelaan had masa tidak pernah diplidkan dalam penyataan pembelaan. Oleh itu, mahkamah menyimpulkan bahawa terdapat kelewatan yang melampau dan besar dalam pemfailan permohonan untuk meminda defendan kesembilan, yang secara efektif akan mengganggu pelupusan segera kes ini (lihat perenggan 6–7 & 9–10).

(2) Mahkamah mendapati bahawa maksud pindaan yang dicadangkan itu bukan sahaja untuk meminda tetapi membangkitkan suatu pembelaan had masa yang sama sekali baru untuk kali pertama. Di samping itu, defendan kesembilan mempunyai pengetahuan yang penuh mengenai dakwaan fraud oleh plaintif terhadapnya, yang diplidkan sepenuhnya dalam penyataan tuntutan plaintif yang dipinda. Oleh itu, ia tidak akan menjadi kepentingan keadilan untuk memberi defendan kesembilan satu peluang untuk bergantung kepada pembelaan yang sama sekali baru di peringkat prosiding mahkamah yang agak terkehadapan. Dalam apa jua hal keadaan, pembelaan had masa yang dicadangkan oleh defendan kesembilan, yang berdasarkan tarikh perbalahan yang berkaitan dengan penemuan sebenar fraud plaintif, dilihat sebagai tanpa merit dan terjumlah kepada penafian kosong (lihat perenggan 11–12 & 14).

(3) Pindaan yang dicadangkan, yang bertujuan untuk memperkenalkan pembelaan had masa yang baru sepenuhnya, adalah mala fide, 'self

serving' dan memudaratkan plaintif. Permohonan, jika dibenarkan, akan secara efektif menyebabkan kausa tindakan plaintif tidak boleh dikekalkan di mahkamah dan menyebabkan ketidakadilan yang bahaya dan tidak wajar. Oleh itu, perintah PKP tersebut seharusnya diketepikan (lihat perenggan 16 & 19–20).]

Notes

For cases on defence, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5943–5981.

Cases referred to

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6, 29
Rules of the High Court 1980 O 20 rr 5, 8(1)

V Alagendra (SS Gabriel with him) (N Saraswathy Devi) for the plaintiff/respondent.
Mahendra Mahesan (RY Nanthan & Partners) for the ninth defendant/appelant.

Nik Hasmat JC:

BACKGROUND FACTS

[1] By way of a writ of summons dated 4 May 1999, the plaintiff commenced action against the first, second, third and fourth defendants and pursuant to the plaintiff's amended statement of claim dated 4 February 2005, the ninth defendant was included as a party to this action. The plaintiff's cause of action against the ninth defendant was the fraudulent charge on the plaintiff's land to obtain banking loan facility for the second defendant company from the first defendant bank of which the ninth defendant was a director.

[2] The trial which involved the plaintiff and the eleven defendants had commenced on 28 September and 29 September 2009 where on both the trial dates, the plaintiff's three witnesses have given their evidence and had closed their case, the first defendant and the defendants' witnesses had completed their evidence in court and the court was at the stage of tendering the third and the fourth defendants' witness's evidence when it was adjourned to 6 November 2009 for continued hearing.

A THE APPLICATION TO AMEND STATEMENT OF DEFENCE

[3] The ninth defendant sought the inherent jurisdiction of the court for leave to amend the ninth defendant's statement of defence dated 22 June 2005 to include a defence of limitation under para 17, statement of defence as per encl 81. The ninth defendant's application to amend the statement of defence was filed on the 8 October 2009, a week after the commencement of the trial and 4 1/2 years after the plaintiff's amended statement of claim dated 4 February 2005 was served on the ninth defendant.

C THE COURT ORDER

[4] Pursuant to a court order dated 18 January 2010, the learned senior assistant registrar ('SAR') granted leave to the ninth defendant to amend the statement of defence dated 22 June 2005 to include the defence of limitation. The plaintiff filed an appeal dated 27 January 2010 against the said order of the SAR where this court on 6 April 2010, allowed the plaintiff's appeal with costs. Accordingly, the order of the SAR dated 18 January 2010 granting the ninth defendant leave to amend the statement of defence was set aside.

E GROUNDS FOR APPEAL

(a) The plaintiff contended that it would not be in the interest of justice to allow the ninth defendant's proposed amendment as the application to amend, to include a new defence, is mala fide and prejudicial to the plaintiff's case.

(b) Based on the provision of the Limitation Act 1953, there is no prescribed period of limitation in matters relating to fraud and as such, the plaintiff's cause of action that of fraud was not time barred.

G (c) The ninth defendant failed to provide clear, convincing and cogent reason to the court to justify their delayed application to amend the statement of defence. The application if allowed, would cause undue and unnecessary delay to the court proceeding which could not be compensated by costs.

H (d) The proposed amendment made at a relatively advanced stage of a court proceeding, was a tactical manouevre by the ninth defendant as the ninth defendant was not likely to succeed with their pleaded defence.

I THE NINTH DEFENDANT'S CONTENTION

[5] The grounds for the ninth defendant's application for the proposed amendment were as follows:

(a) During the plaintiff's testimony in court on 26 September 2009, the

ninth defendant's solicitors came to know that the date of the plaintiff's discovery of fraud on his land was on 12 March 1998 and the plaintiff's cause of action was time barred. As the statement of defence did not plead limitation, the ninth defendant contended that in the interest of justice, the proposed amendment to the ninth defendant's statement of defence however late, was deemed necessary.

(b) The defence of limitation involves a question of law. In determining whether the plaintiff's cause of action is time barred, the court is merely required to determine whether the six years limitation period as specified in the Limitation Act 1953 commenced from the date of the plaintiff's discovery of the alleged fraud on 12 March 1938 or the formal notification of fraud by the police to the plaintiff on 17 February 2000.

(c) The aforesaid determination will not prejudice the plaintiff's case and will not result in any delay to the ongoing court proceeding. The plaintiff need not be recalled by the court to give evidence nor new evidence required from other witnesses as the contentious dates relating to the actual discovery of fraud by the plaintiff form part of the court's record of proceeding.

GROUNDS FOR COURT DECISION

[6] The law on amendment of pleadings is well settled. The provision relating to amendment of a writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980, where an amendment can be made at any stage of proceeding, including a trial. Based on O 20 r 8(1), the court is empowered to allow an amendment of document for the purpose of determining the real controversy between the parties to the proceeding.

[7] The general principle regulating the granting of amendment of pleadings, is that the court will allow such amendment which does not cause injustice to the others as decided in the Federal Court decision in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213. The fundamental questions to be considered in deciding whether injustice would result is whether the application to amend is bona fide, whether any prejudice caused to the other side can be compensated by costs; and whether the proposed amendment would effectively change the suit into another inconsistent character.

Inordinate delay

[8] The plaintiff commenced action against the first defendant, second defendant, third defendant and fourth defendant on 4 May 1999 and pursuant to the plaintiff's amended statement of claim dated 4 February 2005; the ninth

defendant was included as a party to the plaintiff's action. The ninth defendant's application to amend their statement of defence was filed on 8 October 2010. The application was filed 4½ years after the amended statement of claim was served on the ninth defendant. The application was made after the pleadings were closed and the trial which commenced on 28 and 29 September 2009 was at an advanced stage of court's proceeding.

[9] The ninth defendant did not offer any cogent reason for the delay in filing the application except their solicitors sudden realisation after the plaintiff's testimony in court on the 28 September 2009 that the defence of limitation was not pleaded in the statement of defence dated 22 June 2005.

[10] The court therefore concluded that there have been an inordinate and substantial delay in filing the ninth defendant's application and if allowed by the court, would effectively disrupt the expeditious disposal of the case. In this regard, this court was of the view that it was in the interest of justice to disallow the ninth defendant's application to amend and, accordingly allowed the plaintiff's appeal against the order of the learned SAR.

Defence of limitation

[11] Delay alone is not a decisive ground for the court's refusal to grant leave to amend and that the practice is to grant leave to amend. In exercising the court judicial discretion to refuse the proposed amendment, the court took into consideration that the purpose and implication of the ninth defendant's application is not only to amend but to raise a totally new defence of limitation for the first time.

[12] From the time the ninth defendant was included as a party to the plaintiff's action on 4 February 2005, the ninth defendant had full knowledge of the plaintiff's allegation of fraud against him which was pleaded in detail in the plaintiff's amended statement of claim, The ninth defendant being legally represented, ought to have sooner identified and pleaded the appropriate defences where he had all the opportunity to do so upon being served the plaintiff's amended statement of claim 4½, years prior to the trial. If would therefore not be in the interest of justice to present the ninth defendant an opportunity to rely on an entirely new defence at a relatively advanced stage of the court proceeding.

[13] In this regard, ss 6 and 29 of the Limitation Act 1953, distinguish between a right of action and a cause of action where a period of limitation shall not begin to run in any case if, until the plaintiff has discovered the fraud, or could by reasonable diligence have discovered the fraud. The court is therefore of the view that although the plaintiff lodged a police report on the alleged

fraudulent charge on his land on 19 March 1998, the plaintiff's right of action only begin to run from the plaintiff's official discovery of the fraud vide police investigation finding dated 17 December 2000.

[14] In this regard, the ninth defendant proposed defence of limitation which was premised on the contentious dates relating to the plaintiff's actual discovery of the fraud, appear to be without merit and amount to a bare defence.

APPLICATION MALA FIDE AND PREJUDICIAL TO THE PLAINTIFF'S CASE

[15] In exercising the judicial discretion to disallow the proposed amendment, the materiality and effectiveness of a proposed amendment are relevant consideration. The court is of the view that the proposed amendment to include defence of limitation could not determine or facilitate the full and proper determination of the dispute between parties.

[16] The proposed amendment which was intended to introduce an entirely new limitation defence, was mala fide, self serving, and prejudicial to the plaintiff. The application was a mischievous move intended to defeat the implication of the statute of limitation and render the plaintiff's action invalid and unsustainable in court.

[17] Based on paras 22, 23, 24, 25 and 28 of the plaintiff's amended statement of claim, the plaintiff had expressly pleaded in detail the ninth defendant's fraud where paras 23.1, 23.2, 23.3, 23.4, 23.5, 23.6, 23.7, 23.8, 23.9, 23.10, 23.11, 23.12, 23.13 and 23.14 specifically provide the ninth defendant's purported fraudulent involvement in securing banking loan facility for the second defendant company, of which the ninth defendant was a director. Accordingly, the ninth defendant had pleaded the respective defences to the plaintiff's allegation of fraud in his statement of defence dated 22 June 2005.

[18] The issue of fraud therefore, had been expressly pleaded by the plaintiff and clearly defended by the ninth defendant. In any event, the determination as to the actual timing of the plaintiff's discovery of the fraud form an integral part of the body of evidence to be considered by the court during the course of the trial.

[19] The court is also of the view that the ninth defendant's application if allowed, will not transform the suit info another character but would effectively render the plaintiff's cause of action totally unsustainable in court

which could not be compensated with costs or otherwise. The granting of the amendment at a delayed and advanced stage of court proceedings will cause grave and undue injustice and effectively, hammer the final nail in the plaintiff's case.

[20] Therefore, based on the above consideration, the plaintiff's appeal against the order of the learned senior assistant registrar (SAR) dated 18 January 2010 is allowed with costs. Accordingly, the order of the learned SAR granting leave to the ninth defendant to amend the ninth defendant's statement of defence is set aside.

Appeal allowed with costs.

Reported by Kohila Nesan